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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 144.

WILLIAM MADDOX, PLAINTIFF IN ERROR,

vs.

NELSON BURNHAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 27, 1891.

(14,602.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1894.

1 In the Supreme Court of the State of Kansas.

NELSON BURNHAM, Plaintiff in Error,
vs.
WILLIAM MADDOX, Defendant in Error.

Be it remembered that on the 30th day of March, 1887, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with case made attached thereto as a part thereof, from the district court of Allen county, which is in words and figures as follows, to wit:

2 4488.

In the Supreme Court of the State of Kansas.

N. BURNHAM, Plaintiff in Error,
vs.
WM. MADDOX, Defendant in Error.

Petition in Error.

Plaintiff says that heretofore a certain action then pending in the district court of Allen county, wherein plaintiff herein was plaintiff and defendant herein was defendant, judgment was rendered for defendant and against plaintiff, and plaintiff says there was error in said proceedings, as will fully appear by reference to the transcript thereof hereto attached. Said error- are as follows:

1. The admission of evidence excepted to by plaintiff.

2. In overruling motion of plaintiff to set aside findings.

3. In overruling plaintiff's motion for new trial.

4. Judgment was for defendant when it should have been for plaintiff.

Wherefore plaintiff prays that said judgment be reversed and for such relief as he may be entitled.

L. W. KEPLINGER,
Attorney for Plaintiff.

Burnham *vs.* Maddox. Petition in error. Filed March 30th, 1887. C. J. Brown, clerk supreme court.

3 In the Supreme Court of the State of Kansas.

NELSON BURNHAM, Plaintiff,
vs.
C. S. STARKEY, Defendant.

NELSON BURNHAM, Plaintiff,
vs.
WM. MADDOX, Defendant.

CHARLES ENGLEHART, Plaintiff,
vs.
C. S. STARKEY, Defendant.

Feb'y 12, 1887.—Within case made served on us. Service accepted.

KNIGHT & FOUST,
Attorneys for Defendants in Error.

Made Case.

Be it remembered that *heretofore* heretofore, on the 30th day of September, 1881, the plaintiff, Nelson Burnham, filed in the office of the clerk of the district court of Allen county, Kansas, his petition, which was in words and figures following:

In the District Court of Allen County, State of Kansas.

NELSON BURNHAM, Plaintiff,
vs.
C. S. STARKEY, Defendant.

Petition.

Plaintiff owns and is entitled to the immediate possession of the west half of the southeast fourth of section 26, township 25, range 20 east, in Allen county, Kansas, and the defendant wrongfully and unlawfully withholds the possession thereof from him.

Wherefore plaintiff prays judgment for the recovery thereof.

GOODIN & KEPLINGER,
Attorneys for Plaintiff.

And thereafter and within the time fixed for pleading the defendant filed his answer in said cause; which answer, omitting title and caption, is as follows:

The defendant admits that he is in possession of the land in plaintiff's petition described and denies each and every allegation in said petition contained.

C. F. HUTCHINGS,
Attorney for Defendant.

4 Also on said 30th day of September, 1881, the said plaintiff, Nelson Burnham, filed in the office of the clerk of the

district court of Allen county, Kansas, — against the defendant in the above-entitled cause of Nelson Burnham, plaintiff, *vs.* Wm. Maddox, defendant; which petition, with the exception of the description of the land sought to be recovered, was in the precise language of the petition in the said case of Burnham *v.* Starkey, said description being the S. W. ¼ of sec. 24, T. 25, R. 20, and in due time defendant Maddox made answer thereto in the precise language of the defendant Starkey in the case of Burnham *vs.* Starkey, herein set forth.

Also on said 30th day of September, 1881, the plaintiff, C. Englehart, filed in the office of the clerk of the district court of Allen county his petition, which, omitting venue, is in words and figures following:

CHARLES ENGLEHART, Plaintiff,
vs.
C. S. STARKEY, Defendant. } Petition.

The plaintiff says:

1st. That he has a legal and equitable estate in and is entitled to the immediate possession of the following-described real estate, situate in the county of Allen and State of Kansas:

The east half of the southeast quarter of section twenty-six (26), town. twenty-five (25), range twenty (20) east of the sixth principal meridian.

2nd. Plaintiff avers that the said defendant unlawfully keeps him out of the possession of said premises.

Wherefore plaintiff prays judgment against said defendant for the recovery of said property and for costs.

KEPLINGER & GOODIN,
Attorneys for Plaintiff.

And in due time defendant filed answer thereto, which, omitting caption and title, is in the precise language as the answer in the case of Burnham *vs.* Starkey, hereinbefore set forth.

And afterwards, at the adjourned session of the regular November term, said three several causes came on to be tried, the plaintiffs appearing by L. W. Keplinger, their attorney, and the defendants by Messrs. Knight & Foust, their attorneys, and, a trial by jury being waived, said causes came on to be tried by the court.

And it being agreed among counsel that the agreed statement of facts and oral and documentary and all other evidence would be substantially the same in the two cases wherein Nelson Burnham was plaintiff:

5 Also that with the exception of one additional fact, which had been agreed upon and reduced to writing, the evidence in the case of Englehart *vs.* Starkey would be substantially the same as in the two other cases: It was therefore agreed that said causes should be tried together.

And thereupon the plaintiff introduced in evidence the following statement of agreed facts:

1st. The lands mentioned in the plaintiff's, Burnham's, petition were patented to the M., K. & T. R'y Co. on the 3rd of November, 1873, and duly recorded in the office of the register of deeds of Allen county in 1873, a copy of which patent is hereto attached, marked Ex. "A," and the lands mentioned in the Englehart case were patented to said company in 1877. The patent was in precisely same form as Exhibit "A," except that it recited a selection of the lands in the year 1876 and recorded in office of register of deeds, Allen county, in 1877.

2nd. The plaintiff purchased and paid in full for the lands described in his petition in the year 1875, and the plaintiff Englehart contracted with said company in the usual form with deferred payments, which contract purported to give Englehart the right to immediate possession and to a deed upon final payment of the purchase-money.

And the defendant excepted to each and every one of the foregoing facts upon the ground that the same was incompetent, immaterial, and irrelevant, and defendants excepted, specially to the said patent, upon the following grounds, viz: That said patent is incompetent, immaterial, and irrelevant, and is void and conveys no title, and that the same is predicated upon an act of Congress granting lands for railroad purposes, which enjoins the performance of certain acts and things, as in said act stipulated, and that the patent offered was obtained by means of misrepresentation on the part of the patentee as to the performance thereof and without consideration.

All of which were overruled by the court, to which defendants excepted.

And thereupon, the plaintiffs having rested, the defendants introduced the following agreed statement of facts as a part of their defense:

1st. That defendant Maddox is forty-six and defendant Starkey is sixty years of age. They came to the State of Kansas about the 20th of October, 1866, and located upon the lands described in the petitions filed against them respectively at said date and have resided on and occupied the same continuously ever since.

2nd. That at the time they went upon said land it was wild, open, and unimproved prairie land, there being only one cabin within two miles, and at that time there were more Indians than whites in the vicinity.

That at the time defendants went upon said lands they did so with the distinct intention of homesteading the same under
6 the homestead laws of the United States, and said lands were at said date Government lands of the United States and open to homestead entry unless the lands described in Englehart's petition were prevented from so being by reason of the fact that on June 9th, 1866, one Pike Sprague made a homestead filing thereon, in which he alleged settlement thereon on said date, and there is no record in the Land Office which shows that said Sprague ever attempted to make final proof.

4. Immediately upon going upon said lands defendants com-

menced improving the same, and within the first year after going thereon defendant broke fifteen acres of land, planted orchards of about one hundred fruit trees, built houses, fenced a pasture of five or six acres each, and have ever since continued to improve the lands year by year to this time, using and expending all they made on said places to the improvements thereof, and they each have now near one hundred acres, large and commodious dwellings, and orchards of about 17 acres, mostly bearing, and all under fence, and improvements being worth from $2,500 to $3,000 *dollars*.

5. That the withdrawal of the lands in controversy was made April 3, 1867, pursuant to Commissioner's letter received on that day and dated March 19th, 1867; which letter appears on pages 59 and 60 of the 27th Kansas Report, in the opinion of the court in the case of *Neer vs.* Williams, and the same is hereby referred to as a part hereof.

6th. At the time defendants went upon said lands they were and ever since have been heads of families and duly qualified and competent to make a valid homestead entry.

7. At the time the railroad company, through whom plaintiffs claim title, appraised these lands the appraisers knew and were informed by defendants that defendants were homesteading the same and had valuable improvements thereon, and the railroad company's agent and appraiser of the land, to wit, Cap. Heard, stopped at defendant's house on said land while attending to such duties.

8. The lands in controversy are located in Marmaton township, Allen county, Kansas, being one of the most public cross-roads in South Marmaton township, and the roads passing it being the most traveled roads in the township.

9. Defendant's improvements have been assessed to him and he has paid taxes thereon.

And in addition to the foregoing facts the defendants introduced in each of said actions the following evidence:

And the plaintiff objected to each and every part thereof and each and all of the facts contained in the agreed statement introduced by defendants as being incompetent, irrelevant, and immaterial; which objections were overruled, to which plaintiff excepted.

7 Ex. A.

United States of America to all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway from Fort Riley, Kansas, to Fort Smith, Arkansas," authority is given to the Union Pacific Railway Company, south branch, now known as the Missouri, Kansas and Texas Railway Company of Kansas, a corporation existing under the laws of said State, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said act, and provision is made for granting to the

State of Kansas for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad and not exceeding in all ten sections per mile;

And whereas it is further enacted that "in case it shall appear that the United States have, when the line of said road is definitely located, sold any sections or any part thereof granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same, 'then so much land is set apart to be selected for the purposes aforesaid nearest to the sections above specified,' provided that said lands hereby granted as indemnity shall not be selected beyond twenty miles from the line of said road;"

And whereas it is further enacted by the 3rd section of the aforesaid act that "when the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in good, substantial, and workmanlike manner as a first-class railroad patents shall issue to said company for the lands thereby granted;"

And whereas it is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25th, 1870, and map therewith, duly certified by the governor of the State of Kansas, that the said "Missouri, Kansas and Texas Railway Company has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern bound- of the State of Kansas;

And whereas certain tracts have been selected under the act aforesaid by Isaac T. Goodnow, land commissioner of the Missouri, Kansas and Texas Railway Company, as shown by his original list of selections, dated August 10th, 1872, and certified under date of April 14th, 1873, by the register and receiver at Independence, Kansas;

The said tracts being described as follows, to wit: South of the base line and east of the sixth principal meridian, Kansas, twenty-mile limits, Independence district:

(Here, among other lands, are the lands described in Burnham *vs.* Starkey and Burnham *vs.* Maddox.)

The said tracts, as described in the foregoing pages, from one to eleven, inclusive, containing the aggregate area of (81,218.30) eighty-one thousand two hundred and eighteen and $\frac{30}{100}$ acres:

8 Now, know ye that the United States of America, in consideration of the premises and pursuant to said act of Congress, have given and granted, and by these present- do give and grant, unto the said Missouri, Kansas and Texas Railway Company of Kansas and its assigns the tracts of land selected as aforesaid and described in the foregoing—

Yet excluding all "mineral lands," should any such be found to exist on the tracts aforesaid. To have and to hold the said tracts, with the appurtenances thereof, unto the said Missouri, Kansas and Texas Railway Company of Kansas and its assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United

States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this third day of November, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,

[L. S.] By S. D. WILLIAMSON, *Secretary.*

L. K. LIPPINCOTT,

Recorder of the General Land Office.

Recorded in vol. 3, page- 470 to 483, inclusive. Recorded in L. D. O., vol. 1, pages 368 to 378, inclusive.

The foregoing interlineations, alterations, and corrections in the foregoing instrument, underscribed with red ink, were made by me this date to conform with the original instrument.

Feb. 16th, 1875.

R. B. STEPHENSON.

J. S. FAST,

Register of Deeds.

Filed Nov. 21, 1873.

9 C. S. STARKEY, for plaintiff, sworn.

Direct examination by Mr. FOUST:

Q. You and Mr. Maddox located upon the land on which you now reside, on Marmaton township, on the 20th of October, 1866?

A. Somewheres about the time.

Q. Now, I will ask you what relation he is to you?

A. A son-in-law of mine.

Q. I will ask you now to state, after you located, whether you went to the land office at Humboldt; and, of so, at whose instance you went there and for what business?

A. We drove onto the land on Saturday evening, and on Monday morning I took a horse and went to Humboldt to the land office to see if we could have permission for Mattox and me both—I went for both of us—to get these pieces of lands and put up our houses and live in them till the next spring, and then we would make our homestead, and he gave us the permission to do so. He said that he had given others permission to do so. I told him that we were scarce as to money then, but that we would have some money in the spring and then we wanted to make our homestead.

Q. Who was this register?

A. Watson Stuart.

Q. Were you, at the instance and request of Mr. Mattox, attending to his business for him?

A. Yes, sir.

Q. State what you done and what Mattox done after you got this information from the register of the land office on the claims?

A. We went to work.
Q. You went on and made improvements?
A. Yes, sir; and the first work that we done——
Q. You went on and did make improvements?
A. Yes.
Q. When did you next go to the land office?
A. The next time, I think, was in March.
Q. What year?
A. 1867 that would be.
Q. And then what occurred?
A. We went to make our homesteads, and Mr. Goss was register then. I don't know what his first name was, but he went by the name of "Colonel" Goss. He stated that since we had been to the land office before——

(Here the plaintiff objects, as the statements of the register are not competent. Overruled. Exception.)

(Witness continues:) All I said to him was that we were short of money and could not make our homesteads then and that we wanted permission to put up our cabins and live in them until spring——

Q. No—wait; I mean the second time?

A. The second time we went with the intention of perfecting our homesteads, and when we went there Mr. Goss (then Col. Goss), refused us homesteading. He said that the lands were drawn out of the market for the benefit of the M., K. & T. Railroad Company. We stated to him directly what Mr. Stewart had said, and he said that they did not amount to anything, as Stewart was out of the office and the land was out and that we could not homestead it.

Q. Well, now, you and Mr. Mattox have been since occupying the lands, have you?

A. Yes, sir; ever since.

10 Q. Calling your attention to your lands, what was the lands that you were occupying worth—this land that suit is brought for against you? What was its condition when you went on it?

A. There was a- abandoned homestead filing against it by a man by the name of Sprague. As far as I can learn, he made the filing through mistake and got the wrong piece of land. He wanted the east half of the northeast quarter of 26, and, instead of that, he got the east half of the southeast quarter, and after he made his filing he went back.

(Here the plaintiff objects as incom., irrel.)

Q. Did he make any improvements on it?
A. No, sir.
Q. Were there any improvements whatever made on the land by him?
A. No, sir.
Q. There was an abandoned filing on it?
A. Yes, sir.